

No. 2113

United States
Circuit Court of Appeals

For the Ninth Circuit.

OREGON SHORT LINE RAILROAD COMPANY,
a Corporation,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record

*Upon Writ of Error From the United States District
Court for the District of Idaho, Eastern Division.*

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Names and Addresses of Attorneys of Record.

GEORGE H. SMITH, Salt Lake, Utah;

H. B. THOMPSON, Pocatello, Idaho;

Attorneys for Plaintiff in Error.

J. L. McCLEAR, United States Attorney for District
of Idaho;

J. R. SMEAD, Assistant United States Attorney for
District of Idaho;

Boise, Idaho;

Attorneys for Defendant in Error.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

2800.

THE UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

COMPLAINT.

Now comes the United States of America, by James L. McClear, United States Attorney for the District of Idaho, and brings this action on behalf of the United States against the Oregon Short Line Railroad Company, a corporation organized and doing business under the laws of the State of Utah, and having an office and place of business at Shelley, in the State of Idaho; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A FIRST CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by

limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant during the twenty-four-hour period beginning at the hour of 7:00 o'clock A. M. on April 2, 1915, at its office and station at Shelley, in the State of Idaho, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: A. R. Weston, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-wit: From said hour of 7:00 o'clock A. M. on said date, to the hour of 8:00 o'clock P. M. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to the plaintiff in the sum of five hundred dollars.

FOR A SECOND CAUSE OF ACTION

plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon,"

approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 7:00 o'clock A. M. on April 3, 1915, at its office and station at Shelley, in the State of Idaho, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: A. R. Weston, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-wit: From said hour of 7:00 o'clock A. M. on said date, to the hour of 8:30 o'clock P. M. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A THIRD CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the

safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 7:00 o'clock A. M. on April 5, 1915, at its office and station at Shelley, in the State of Idaho, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: A. R. Weston, to be and remain on duty for a period longer than nine hours in said twenty-four-hour period, to-wit: From said hour of 7:00 o'clock A. M. on said date, to the hour of 6:30 o'clock P. M. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FOURTH CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 7:00 o'clock A. M. on April 6, 1915, at its office and station at Shelley, in the State of Idaho, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: A. R. Weston, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-wit: From said hour of 7:00 o'clock A. M. on said date, to the hour of 6:30 o'clock P. M. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

FOR A FIFTH CAUSE OF ACTION
plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier en-

gaged in interstate commerce by railroad in the State of Idaho.

Plaintiff further alleges that in violation of the Act of Congress, known as "An Act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon," approved March 4, 1907 (contained in 34 Statutes at Large, page 1415), defendant, during the twenty-four-hour period beginning at the hour of 6:30 o'clock A. M. on April 20, 1915, at its office and station at Dayton, in the State of Idaho, and within the jurisdiction of this court, required and permitted its certain telegraph operator and employee, to-wit: T. E. Vissing, to be and remain on duty for a longer period than nine hours in said twenty-four-hour period, to-wit: From said hour of 6:30 o'clock A. M. on said date, to the hour of 12 o'clock, noon, on said date, and from the hour of 1:00 o'clock P. M. on said date, to the hour of 7:40 o'clock P. M. on said date.

Plaintiff further alleges that during all the times mentioned herein said office and station was one continuously operated night and day, and that said employee, while required and permitted to be and remain on duty as aforesaid, by the use of the telegraph or telephone, dispatched, reported, transmitted, received and delivered orders pertaining to and affecting the movement of trains engaged in interstate commerce.

Plaintiff further alleges that by reason of the violation of said Act of Congress, defendant is liable to plaintiff in the sum of five hundred dollars.

Wherefore, plaintiff prays judgment against said defendant in the sum of twenty-five hundred dollars and its costs herein expended.

JAMES S. McCLEAR,
United States Attorney.

Endorsed: Filed Sept. 8, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

No. 172.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,
Defendant.

ANSWER.

Comes now the defendant, Oregon Short Line Railroad Company, and for answer to the complaint filed herein, admits, denies and alleges as follows:

ANSWERING THE FIRST ALLEGED CAUSE
OF ACTION:

The defendant admits that it now is and was at all of the times therein mentioned a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Further answering said first alleged cause of action, defendant denies that during the twenty-four-hour period beginning at the hour of 7:00 o'clock

A. M. on April 2, 1915, at its office at Shelley, Idaho, it required and permitted or required or permitted its telegraph operator and employee, A. R. Weston, to be or remain on duty for a longer period than nine hours in said twenty-four-hour period, but admits that said A. R. Weston was at said time and place employed by this defendant as station agent and telegraph operator at Shelley, Idaho, within the jurisdiction of this court, and that on said 2nd day of April, 1915, said A. R. Weston did work as an operator and remain on duty as an operator from 7:00 o'clock A. M. on said date until 12:00, noon, thereof, and from 1:00 P. M. on said date to 5:00 P. M. thereof, and thereafter on said date, without the knowledge, permission or consent of this defendant, did continuously remain on duty, performing clerical work, but not as an operator, until 8:00 P. M. on said date.

Defendant admits that during all of the times mentioned in said complaint said office and station was one continuously operated day and night, but denies that said employee, while required or permitted to be and remain on duty, did at any time on said date after 5:00 P. M. thereof telegraph or telephone, dispatch, report, transmit, receive or deliver orders pertaining to or affecting the movement of trains engaged in interstate commerce.

Denies that the defendant is indebted to the plaintiff in the sum of \$500.00 or any other amount.

Further answering said first alleged cause of action, and as additional defense thereto, defendant al-

leges that prior to the said 2nd day of April, 1915, this defendant had issued and delivered instructions to all agents and operators, including the said A. R. Weston, prohibiting them and each of them from working in any capacity or performing any service of whatsoever nature, in excess of nine hours in any 24-hour period in any tower, office, station or place continuously operated night and day, but that notwithstanding said instructions and prohibition the said A. R. Weston remained continuously on duty as operator for a period of nine hours, and thereafter performed clerical services for an additional period of three hours, but that said clerical services were performed without the knowledge, permission or consent of this defendant, or any of its officers or agents except said servant, A. R. Weston, who was at said time acting contrary to the express instructions hereinbefore mentioned.

ANSWERING THE SECOND ALLEGED CAUSE OF ACTION:

The defendant admits that it now is and was at all of the times therein mentioned a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Further answering said second alleged cause of action, defendant denies that during the twenty-four-hour period beginning at the hour of 7:00 o'clock A. M. on April 3, 1915, at its office at Shelley, Idaho, it required and permitted or required or permitted its telegraph operator and employe, A. R. Weston, to be or remain on duty for a longer period

than nine hours in said 24-hour period, but admits that said A. R. Weston was at said time and place employed by this defendant as station agent and telegraph operator at Shelley, Idaho, within the jurisdiction of this court, and that on said 3rd day of April, 1915, said A. R. Weston did work as an operator and remain on duty as an operator from 7:00 o'clock A. M. on said date until 12:00, noon, thereof, and from 1:00 P. M. on said date to 5:00 P. M. thereof, and thereafter on said date, without the knowledge, permission or consent of this defendant, did continuously remain on duty, performing clerical work, but not as an operator, until 8:30 P. M. on said date.

Defendant admits that during all of the times mentioned in said complaint said office and station was one continuously operated day and night, but denies that said employe, while required or permitted to be or remain on duty, did at any time on said date after 5:00 P. M. thereof telegraph or telephone, dispatch, report, transmit, receive or deliver orders pertaining to or affecting the movement of trains engaged in interstate commerce.

Denies that the defendant is indebted to the plaintiff in the sum of \$500.00 or any other amount.

Further answering said second alleged cause of action, and as additional defense thereto, defendant alleges that prior to the said 3rd day of April, 1915, this defendant had issued and delivered instructions to all agents and operators, including the said A. R. Weston, prohibiting them and each of them from

working in any capacity or performing any service of whatsoever nature, in excess of nine hours in any 24-hour period in any tower, office, station or place continuously operated night and day, but that, notwithstanding said instructions and prohibition, the said A. R. Weston remained continuously on duty as operator for a period of nine hours, and thereafter performed clerical services for an additional period of three hours and a half, but that said clerical services were performed without the knowledge, permission or consent of this defendant, or of any of its officers or agents except said servant, A. R. Weston, who was at said time acting contrary to the express instructions hereinbefore mentioned.

ANSWERING THE THIRD ALLEGED CAUSE OF ACTION:

The defendant admits that it now is and was at all of the times therein mentioned a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Further answering said third alleged cause of action, defendant denies that during the twenty-four-hour period beginning at the hour of 7:00 o'clock A. M. on April 5, 1915, at its office at Shelley, Idaho, it required and permitted or required or permitted its telegraph operator and employe, A. R. Weston, to be or remain on duty for a longer period than nine hours in said 24-hour period, but admits that said A. R. Weston was at said time and place employed by this defendant as station agent and telegraph operator at Shelley, Idaho, within the jurisdiction of

this court, and that on said 5th day of April, 1915, said A. R. Weston did work as an operator and remain on duty as an operator from 7:00 o'clock A. M. on said date until 12:00, noon, thereof, and from 1:00 P. M. on said date to 5:00 P. M. thereof, and thereafter on said date, without the knowledge, permission or consent of this defendant, did continuously remain on duty, performing clerical work, but not as an operator, until 6:30 P. M. on said date.

Defendant admits that during all of the times mentioned in said complaint said office and station was one continuously operated day and night, but denies that said employe, while required or permitted to be or remain on duty, did at any time on said date after 5:00 P. M. thereof telegraph or telephone, dispatch, report, transmit, receive or deliver orders pertaining to or affecting the movement of trains engaged in interstate commerce.

Denies that the defendant is indebted to the plaintiff in the sum of \$500.00 or any other amount.

Further answering said third alleged cause of action, and as additional defense thereto, defendant alleges that prior to the 5th day of April, 1915, this defendant had issued and delivered instructions to all agents and operators, including the said A. R. Weston, prohibiting them, and each of them, from working in any capacity or performing any service of whatsoever nature, in excess of nine hours in any 24-hour period in any tower, office, station or place continuously operated night and day, but that, not-

withstanding said instructions and prohibition, the said A. R. Weston remained continuously on duty as operator for a period of nine hours, and thereafter performed clerical services for an additional period of one hour and a half, but that said clerical services were performed without the knowledge, permission or consent of this defendant, or of any of its officers or agents except the said servant, A. R. Weston, who was at said time acting contrary to the express instructions hereinbefore mentioned.

ANSWERING THE FOURTH ALLEGED CAUSE
OF ACTION:

The defendant admits that it now is and was at all of the times therein mentioned a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Further answering said fourth alleged cause of action, defendant denies that during the twenty-four-hour period beginning at the hour of 7:00 o'clock A. M. on April 6th, 1915, at its office at Shelley, Idaho, it required and permitted or required or permitted its telegraph operator and employe, A. R. Weston, to be or remain on duty for a longer period than nine hours in said 24-hour period, but admits that said A. R. Weston was at said time and place employed by this defendant as station agent and telegraph operator at Shelley, Idaho, within the jurisdiction of this court, and that on said 6th day of April, 1915, said A. R. Weston did work as an operator and remain on duty as an operator from 7:00 o'clock A. M. on said date until 12:00,

noon, thereof, and from 1:00 P. M. on said date to 5:00 P. M. thereof, and thereafter on said date, without the knowledge, permission or consent of this defendant, did continuously remain on duty, performing clerical work, but not as an operator, until 6:30 P. M. on said date.

Defendant admits that during all of the times mentioned in said complaint said office and station was one continuously operated day and night, but denies that said employe, while required or permitted to be or remain on duty, did at any time on said date after 5:00 P. M. thereof telegraph or telephone, dispatch, report, transmit, receive or deliver orders pertaining to or affecting the movement of trains engaged in interstate commerce.

Denies that the defendant is indebted to the plaintiff in the sum of \$500.00 or any other amount.

Further answering said fourth alleged cause of action, and as additional defense thereto, defendant alleges that prior to the 6th day of April, 1915, this defendant had issued and delivered instructions to all agents and operators, including the said A. R. Weston, prohibiting them, and each of them, from working in any capacity or performing any service of whatsoever nature, in excess of nine hours in any 24-hour period in any tower, office, station or place continuously operated night and day, but that, notwithstanding said instructions and prohibition, the said A. R. Weston remained continuously on duty as operator for a period of nine hours, and thereafter performed clerical services for an additional period

of one hour and a half, but that said clerical services were performed without the knowledge, permission or consent of this defendant, or any of its officers or agents except the said servant, A. R. Weston, who was at said time acting contrary to the express instructions hereinbefore mentioned.

FOR ANSWER TO THE FIFTH ALLEGED
CAUSE OF ACTION:

Defendant admits that it now is and was at all of the times therein mentioned a common carrier engaged in interstate commerce by railroad in the State of Idaho.

Defendant admits that during the 24-hour period beginning at the hour of 6:30 A. M. on April 20, 1915, at its office and station at Dayton, in the State of Idaho, and within the jurisdiction of this court, it did permit a certain telegraph operator, to-wit: T. E. Vissing, to be and remain on duty for a longer period than nine hours in said 24-hour period as set forth in said fifth cause of action, but denies that at the time therein mentioned said office and station was one continuously operated night and day, but defendant alleges the fact to be that on the afternoon of the 19th day of April, 1915, it issued an order which provided that, effective April 19, 1915, the night office at Oxford (distant 10 miles from said station of Dayton) should be closed and a night office opened at Dayton, and that the hours at Dayton should be from 9:00 A. M. to 7:00 P. M. and 10:00 P. M. to 8:00 A. M., and directed an additional operator to report at Dayton on the morning of April 20, 1915.

That said additional operator did not report until 7:40 on the afternoon of said day, and that on the morning of said 20th day of April, 1915, the order hereinbefore referred to was suspended to the extent that said T. E. Vissing was directed to and did proceed to work for the number of hours that he had been accustomed to work at said station as a station not continuously operated night and day, except that he went on duty on the morning of said 20th day of April, 1915, at 6:30 A. M. instead of 9:00 A. M. as theretofore, but that said station had not been open or operated on the night preceding or one continuously operated prior to the said T. E. Vissing going on duty at 6:30 A. M. on said date, and that said station did not in fact fall within the class of one continuously operated night and day until after the services performed by the said T. E. Vissing set forth in said complaint.

Denies that the defendant is indebted to the plaintiff in the sum of \$500.00 or any other amount.

Wherefore, the defendant, having fully answered herein, prays that it may be hence dismissed with its just costs and disbursements herein incurred.

GEORGE H. SMITH,

H. B. THOMPSON,

Attorneys for Defendant.

Residence and postoffice address: H. B. Thompson, Pocatello, Idaho.

State of Idaho,

County of Bannock.—ss.

H. B. Thompson, being first duly sworn, deposes

and says: That he is attorney and statutory agent for the Oregon Short Line Railroad Company, the defendant herein; that he has read the above and foregoing answer and is acquainted with the contents thereof, and he verily believes the matters therein stated to be true.

H. B. THOMPSON.

Subscribed and sworn to before me this 27th day of September, 1915.

CARL BARNARD,

(Seal)

Notary Public,

Pocatello, Idaho.

Service acknowledged and a copy thereof received this 28th day of September, 1915.

J. L. McCLEAR,

J. R. SMEAD,

Attorneys for Plaintiff.

Endorsed: Filed Sept. 28, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States in and for
the District of Idaho, Eastern Division.*

No. 172.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

MOTION FOR JUDGMENT.

Comes now the United States of America, plaintiff in the above entitled action, and moves this Court

that judgment be entered in its favor and against defendant on the pleadings herein for the following reasons, to-wit:

I.

If the truth of the allegations in defendant's answer on file herein contained be admitted, such facts are nevertheless insufficient to constitute at law any defense to the allegations of plaintiff's complaint on file herein. This motion is directed to each count of plaintiff's complaint herein and the corresponding count of defendant's answer, in which is purported to be stated a defense to the corresponding count in plaintiff's complaint.

J. R. SMEAD,
Assistant United States Attorney for
the District of Idaho,

Attorney for Plaintiff.

Endorsed: Filed Oct. 20, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

*In the United States District Court for the District
of Idaho, Eastern Division.*

UNITED STATES,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD CO.,

Defendant.

DECISION.

October 23, 1915.

John R. Smead, Assistant U. S. District Attorney, for Plaintiff.

George H. Smith and H. B. Thompson, for Defendant.

Dietrich, District Judge:

This is an action to recover from the defendant penalties for five different alleged violations of what is commonly known as the "Hours of Service Act" (34 Stat. 1415). Upon the coming in of the defendant's answer to the complaint, the plaintiff moved for judgment on the pleadings, and by agreement between counsel the cause has been finally submitted upon the questions of law thus raised. There are five counts in the complaint, the first four of which are in legal aspect identical; a distinct question is presented by the answer to the fifth.

As to each of the first four counts the defendant admits that its employe, A. R. Weston, a telegraph operator in its station at Shelley, Idaho, remained on duty nine hours in the twenty-four as operator, and thereafter three additional hours performing clerical work. It also concedes that the fact that the overtime was given to clerical work is not controlling, but it further alleges that this extra service was in violation of the defendant's general rules, and was without the knowledge of any of its officers or agents other than Weston himself; and this want of actual knowledge is the defense and the only defense relied upon.

A carrier is liable if, in the language of the act, it "requires or permits" an employe to remain on duty more than nine hours; and under section 3 it is "deemed to have had knowledge of all acts of its

officers and agents.” The precise point urged by the defendant is that, not having actual knowledge that Weston was working over-time, it cannot be held to have “permitted” the unlawful act, for the term permit necessarily implies both knowledge and consent. *Gregory v. United States*, 10 Fed. Cases 1195, 1197; *In re Wilmington*, 120 Fed. 180, 184; *Wilson v. State*, 46 N. E. 1050, 1051; *People v. Conness*, 88 Pac. 821, 824; *Words and Phrases*, Vol. 6, p. 5317. The difficulty with the argument is that if it is given place, section 3 of the act is rendered wholly ineffective, for if the knowledge thus imputed cannot, when considered in connection with inaction on the part of the carrier, be made the basis for an inference or permission or consent, it can serve no useful purpose at all. If not only knowledge but permission in fact must be proved, and if, as contended, permission in fact cannot be predicated upon the imputed knowledge, it necessarily follows that actual knowledge must always be affirmatively established as any other material fact. In the argument the knowledge referred to in section 3 was assumed to be constructive only, but it is to be noted that it is not so designated in the act. The declaration is that the carrier shall be “deemed to have had knowledge”—not constructive knowledge. A corporation can, of course, acquire knowledge only through its officers and agents. Under the rules of general law it is chargeable with the knowledge not of all of its officers and agents, but of only certain classes thereof. But within the scope of the rule, actual notice to the officer or agent is deemed to be actual notice to the corporation. It

is thought that the statute here simply operates to enlarge or extend the application of the general rule beyond those certain classes to which it is now confined, to all officers and agents, and therefore the knowledge which comes to the corporation through an inferior agent is of the same quality as that which comes through one having general authority; in both cases the notice is deemed to be actual and not merely constructive. I am unable to yield to the suggestion that the only effect of section 3 is to cast upon the carrier the burden of showing that it was without knowledge. The language is inapt to express such a purpose. The declaration is absolute and unqualified: "In all prosecutions * * * the common carrier shall be deemed to have had knowledge, etc." The statute identifies the carrier with all of its agents, inferior as well as superior, and to it is imputed the knowledge of any one of them. It once appearing that some officer or agent had knowledge, it becomes quite immaterial to show that other officers or agents were without such knowledge. It is doubtless true that so interpreted the act is rigorous and may now and then operate harshly upon the carrier, but, upon the other hand, it is apparent that under the view urged by the defendant it would be a much less efficient means of accomplishing the manifest purpose for which it was designed. From the discussion it follows that the answer states no defense to the first four causes of action, and as to them the motion for judgment must be allowed. It should be added that while the reasoning may in some respects

be different, the conclusion is fully supported by *O.-W. R. & N. Ry. Co. v. United States*, 213 Fed. 688, and is, to say the least, not out of harmony with the views expressed by the Circuit Court of Appeals in its opinion of affirmance in that case (223 Fed. 596).

The controlling question touching the fifth cause of action is whether or not the defendant's telegraph office or station at Dayton, Idaho, was, during the whole of the 20th day of April, 1915, "continuously operated," as contemplated by the provisions of the act. The operator, Vissing, was on duty more than nine, but less than thirteen hours, and if it was not a "continuously operated" office, no wrong was done. It appears that prior to April 20th Vissing had been the sole operator, and the office was kept open only part of the time, but on April 19th the defendant issued an order that, commencing with the 20th, the office should be continuously operated, and arranged for an additional operator. But upon the morning of the 19th the new operator having failed to appear, the order of the preceding day was suspended until the evening of the 20th, when the services of an additional operator were secured. Vissing was on duty for the number of hours he had been accustomed to work, and as a matter of fact the office was kept open continuously on the 20th. But I am inclined to think that what was done was obnoxious to neither the letter nor the spirit of the act. Suppose that, the other facts being the same, the company had not decided to change to a "continuously operated" office until the hour of seven-forty P. M. on

April 20th, the time when the additional operator appeared. We would have a case where the office was in fact operated continuously on April 20th, but in law it did not become such until seven-forty P. M., and surely the decision at that hour to change the character of office could not be given the retroactive effect of making unlawful the service of Vissing, which at the time it was rendered was entirely within the terms of the statute. In principle and legal aspect the supposed case is indistinguishable from the case made by the answer. Accordingly as to the fifth count the motion will be denied and the complaint dismissed.

Endorsed: Filed Oct. 23, 1915. W. D. McReynolds, Clerk.

*In the District Court of the United States in and for
the District of Idaho, Eastern Division.*

No. 172.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

DECREE.

This cause, having heretofore come on for hearing, and the same having been submitted to the consideration of this Court by agreement of attorneys for the respective parties signified in open court, upon plaintiffs' motion for judgment upon the plead-

ings; and the Court having heard the arguments touching said motion by respective counsel, and being fully advised in the premises;

Now, therefore, it is hereby ordered, adjudged and decreed that the plaintiff have and recover from the defendant the sum of fifty (\$50.00) dollars on each of the first four counts of plaintiff's complaint, a total sum of two hundred (\$200.00) dollars, together with plaintiff's costs in this behalf laid out and expended, hereby taxed at the sum of \$16.00, to which defendant's exception is noted and allowed.

And it is hereby further ordered, adjudged and decreed that the plaintiff take nothing by reason of the fifth count in said complaint and that as to said fifth count plaintiff's complaint be, and the same hereby is, dismissed.

FRANK S. DIETRICH,

Judge.

Dated October 28th, 1915.

Endorsed: Filed Oct. 28, 1915. W. D. McReynolds, Clerk. Pearl E. Zanger, Deputy.

*In the District Court of the United States in and for
the District of Idaho, Eastern Division.*

No. 172.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON SHORT LINE RAILROAD COMPANY,
a Corporation, *Defendant.*

BILL OF EXCEPTIONS.

This cause came on duly and regularly for hearing before Honorable F. S. Dietrich, Judge of the above court, on the 20th day of October, 1915, J. R. Smead, Esq., appearing for the plaintiff, and H. B. Thompson, Esq., appearing for the defendant. Whereupon the plaintiff filed in open court motion for judgment on the pleadings and a demurrer to the defendant's answer, but withdrew said demurrer, and thereupon, pursuant to agreement between counsel for the respective parties orally made in open court, said motion for judgment on the pleadings was argued by counsel and submitted and by the court taken under advisement; and thereafter the court being fully advised did on the 23rd day of October, 1915, make a written decision, which is filed herein, allowing said motion for judgment on the pleadings with reference to the first four causes of action, and denied said motion as to the fifth or last cause of action; and thereafter on the 28th day of October, 1915, a judgment of the court was duly signed and filed decreeing that the plaintiff have and recover from the defendant the sum of \$50.00 on each of said four counts, or causes of action, making a total sum of two hundred (\$200.00) dollars, together with plaintiff's costs taxed in the sum of \$16.00, and on motion of defendant's counsel, which was consented to by counsel for plaintiff, it was expressly stated that defendant have and be allowed an exception to the judgment of the court as aforesaid, and exception is hereby allowed defendant's counsel to the ruling and decision of the court and its said judgment.

Thereupon defendant tenders this its bill of exceptions to the action of the court in the particulars hereinbefore set forth, which is signed in open court, sealed and made a part of the record in this case this 6th day of November, 1915.

FRANK S. DIETRICH,
Judge of said Court.

Consent to the allowance and filing of the foregoing bill of exceptions is hereby given, and service thereof hereby acknowledged.

J. L. McCLEAR,
U. S. Attorney, District of Idaho;
J. R. SMEAD,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Endorsed: Filed Nov. 6, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States in and for
the District of Idaho, Eastern Division.*

No. 172.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON SHORT LINE RAILROAD COMPANY,
Defendant.

PETITION FOR WRIT OF ERROR.

To the Honorable F. S. Dietrich, Judge of the District Court aforesaid:

Now comes the Oregon Short Line Railroad Com-

pany, defendant herein, by its attorneys, and respectfully shows that on the 28th day of October, 1915, this court entered judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Your petitioner, feeling itself aggrieved by said judgment entered as aforesaid, herewith petitions the court for an order allowing it to prosecute a writ of error in the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such case made and provided.

Wherefore, Your petitioner prays that a writ of error may be issued in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of errors so complained of, and that the transcript of record, pleadings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals; and that an order be made fixing the amount of security which defendant shall furnish upon said writ of error for costs and damages, and to operate as a supersedeas bond.

GEORGE H. SMITH,

H. B. THOMPSON,

Attorneys for Defendant.

Residence and postoffice address: H. B. Thompson, Pocatello, Idaho.

Service of the foregoing petition admitted this 13th day of December, 1915.

J. L. McCLEAR,

J. R. SMEAD,

Attorneys for Plaintiff.

Endorsed: Filed Dec. 13th, 1915. W. D. McReynolds, Clerk.

*In the District Court of the United States in and for
the District of Idaho, Eastern Division.*

No. 172.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

ASSIGNMENTS OF ERROR.

The Oregon Short Line Railroad Company, defendant in this action, in connection with and as a part of its petition for a writ of error filed herein makes the following assignments of error which it avers were committed by the court in the rendition of the judgment against this defendant appearing from the records herein, that is to say:

1. The Court erred in holding and deciding that the plaintiff was entitled to judgment on the pleadings on each of the first four counts of the complaint.

2. The Court erred in rendering judgment on the

pleadings against the defendant on the first four counts of the complaint, and each thereof.

OREGON SHORT LINE RAILROAD COM-

PANY,

Defendant.

By GEORGE H. SMITH,

H. B. THOMPSON,

Its Attorneys.

Residence and postoffice address: H. B. Thompson, Pocatello, Idaho.

Service of the foregoing assignments of error is hereby admitted this 13th day of December, 1915.

J. L. McCLEAR,

J. R. SMEAD,

Attorneys for Plaintiff.

Endorsed: Filed Dec. 13th, 1915. W. D. McReynolds, Clerk.

*In the District Court of the United States in and for
the District of Idaho, Eastern Division.*

No. 172.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

ORDER ALLOWING WRIT OF ERROR.

On this 13th day of December, 1915, came defendant, by its attorneys, and filed herein and presented to the court its petition praying for the allowance of

a writ of error, and filed herein and presented an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the said writ of error upon the defendant's giving bond according to law in the sum of one thousand (\$1000.-00) dollars, which shall operate as a supersedeas bond.

FRANK S. DIETRICH,
Judge.

Service of the foregoing order allowing writ of error admitted this 13th day of December, 1915.

J. L. McCLEAR,
J. R. SMEAD,
Attorneys for Plaintiff.

Endorsed: Filed Dec. 13th, 1915. W. D. McReynolds, Clerk.

*In the District Court of the United States in and for
the District of Idaho, Eastern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

VS.

OREGON SHORT LINE RAILROAD COMPANY,
Defendant.

SUPERSEDEAS BOND.

Know All Men by These Presents: That the Oregon Short Line Railroad Company, as principal, and D. W. Church and Lyman Fargo, as sureties, are held and firmly bound unto the United States of America in the full and just sum of one thousand (\$1000.00) dollars, to be paid to the said United States of America, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated this 11th day of December, 1915.

Whereas, Lately at the October term of the District Court of the United States within and for the District of Idaho, Eastern Division, in a suit pending in said court between the United States of America, plaintiff, and Oregon Short Line Railroad Company, defendant, judgment was rendered against said defendant, and said defendant has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, sixty (60) days from and after the date of said citation.

Now the condition of the above obligation is such that if the said Oregon Short Line Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs, if it shall fail to make

good its plea, then the above obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered this 11th day of December, 1915.

OREGON SHORT LINE RAILROAD COMPANY.

By H. B. THOMPSON,
Its Attorney.

D. W. CHURCH,
LYMAN FARGO,
Sureties.

State of Idaho,
County of Bannock,—ss.

D. W. Church and Lyman Fargo, each being severally duly sworn, deposes and says: That he is the surety whose name is subscribed to the within and foregoing undertaking; that he is a resident and freeholder within the County of Bannock, State of Idaho, and that he is worth the sum specified in the within and foregoing undertaking as the penalty thereof, over and above all his just debts and liabilities, and exclusive of property exempt by law from execution.

D. W. CHURCH.
LYMAN FARGO.

Subscribed and sworn to before me this 11th day of December, 1915.

(Seal)

LORENZO D. BROWN,
Notary Public,
Pocatello, Idaho.

My commission expires June 10th, 1916.

We hereby accept the foregoing bond and the sureties thereon as a sufficient bond on the writ of error allowed herein.

J. L. McCLEAR,
J. R. SMEAD,
Attorneys for Plaintiff.

Approved this 13th day of December, 1915.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed Dec. 13th, 1915. W. D. McReynolds, Clerk.

*In the District Court of the United States in and for
the District of Idaho, Eastern Division.*

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OREGON SHORT LINE RAILROAD COMPANY,
Defendant.

WRIT OF ERROR.

*The President of the United States of America to
the Honorable Judge of the District Court of
the United States for the District of Idaho,
Eastern Division—Greeting:*

Because in the records and proceedings, as also in the rendition of the judgment in a cause pending in the said District Court before you, at the October term, 1915, thereof, between the Oregon Short Line Railroad Company, plaintiff in error, and the United States of America, defendant in error, a manifest er-

ror hath happened, to the great damage of the said Oregon Short Line Railroad Company, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial District, together with this writ, so that you have the same at the City of San Francisco in the State of California within thirty (30) days from the date hereof, in the said Circuit Court of Appeals, to be then and there held that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may further cause to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witnesseth, The Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 13th day of December, in the year of our Lord 1915.

Issued at Boise, Idaho, with the seal of the United States District Court of the District of Idaho, and dated as aforesaid.

(Seal)

W. D. McREYNOLDS,

Clerk of said United States District Court.

Allowed by Frank S. Dietrich, District Judge.

Endorsed: Filed Dec. 13th, 1915. W. D. McReynolds, Clerk.

*In the District Court of the United States in and for
the District of Idaho, Eastern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON SHORT LINE RAILROAD COMPANY,

Defendant.

CITATION.

*The President of the United States to the United
States of America, and to J. L. McClear and
J. R. Smead, United States Attorneys for the
District of Idaho—Greeting:*

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Judicial District, to be held at the City of San Francisco in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States for the District of Idaho, Eastern Division, wherein the Oregon Short Line Railroad Company is plaintiff in error, and you the said United States of America is defendant in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, The Honorable William B. Gilbert, United States Circuit Judge, this 13th day of December, 1915.

FRANK S. DIETRICH,

United States District Judge.

Service of the within citation admitted this 13th day of December, 1915.

J. L. McCLEAR,
J. R. SMEAD,
Attorneys for Defendant in Error.

Endorsed: Filed Dec. 13th, 1915. W. D. McReynolds, Clerk.

*In the District Court of the United States in and for
the District of Idaho, Eastern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OREGON SHORT LINE RAILROAD COMPANY,
Defendant.

RETURN TO WRIT OF ERROR.

In obedience to the command of the within writ, I herewith transmit to the Ninth Circuit Court of Appeals of the United States, a duly certified transcript of the record and proceedings in the within entitled cause, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the United States District Court for the District of Idaho.

(Seal)

W. D. McREYNOLDS,
*Clerk of the United States District Court
for the District of Idaho.*

CLERK'S CERTIFICATE OF TRANSCRIPT OF
RECORD.

I, W. D. McReynolds, Clerk of the District Court of the United States in and for the District of Idaho, do hereby certify that the above and foregoing transcript of pages from 1 to 43, inclusive, contain true and correct copies of the Complaint, Answer, Motion for Judgment on the Pleadings, Opinion of the Court, Judgment, Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Bond on Writ of Error, Writ of Error, Citation on Writ of Error, Return to Writ of Error, and Certificate of Clerk, in the above entitled cause, which constitute the transcript of the record and return to the annexed Writ of Error.

I further certify that the costs of the record herein amount to the sum of \$63.85 and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said District Court affixed at Boise, Idaho, this 24th day of December, 1915.

W. D. McREYNOLDS,
Clerk.

